In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 980

JOE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 353 F. 2d 614.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 6, 1965. On January 5, 1966, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including February 4, 1966. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

213-597—66

QUESTIONS PRESENTED

1. Whether, where both sides agreed to submit the issue of obscenity to the jury on the basis of the materials themselves, it was error for the government to fail to adduce testimony regarding obscenity.

2. Whether the materials at issue were properly found by the jury to be obscene.

STATUTES INVOLVED

18 U.S.C. 1461:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
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> * * * * *
>
> Every written or printed card, letter, circular, booklet, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * * whether sealed or unsealed; * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense * * *.

18 U.S.C. 1463:

> All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.
>
> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted, after a trial by jury, on twenty-three counts charging him with mailing obscene material or information concerning where obscene material could be obtained (R. 3a, 12a).[1] The first five counts charged the mailing of packages whose outside wrapper bore an obscene label, in violation of 18 U.S.C. 1463; two counts charged the mailing of obscene phonograph records, in violation

[1] A twenty-fourth count charging conspiracy, was dismissed on the motion of the Government (R. 2a). "R." refers to the record in this Court. "GX" refers to the government exhibits in the trial court.

of 18 U.S.C. 1461;[2] and the remaining counts charged the mailing of advertisements for those records, also in violation of 18 U.S.C. 1461 (R. 4a–9a). Petitioner was fined $1,000 on the first count and he received concurrent six-month suspended sentences on the remaining counts (R. 3a, 12a).

The label which was the subject of the first count—as to which the fine was imposed—and four additional counts—as to which concurrent six-month suspended sentences were imposed—bears the legend "A sexsational 'party' record," sets out the titles of the two songs contained on the record ("My Pussy Belongs to Daddy" and "Tony's Got Hot Nuts") and gives the price of the record and petitioner's name and address as the "record manufacturer" (GX 1–5). The two records which were submitted to the jury in connection with the remaining counts—as to which concurrent six-month suspended sentences were also imposed—are entitled "Erotica—the rhythms of love" and "Nights of Love in Lesbos." The first is described on the record jacket as containing "the sounds and rhythms of erotic love." It contains no intelligible speech. According to its jacket it is "not interpretative" or a "sophisticated facsimile," but purports to be a reproduction of the actual sounds of acts of sexual intercourse (GX 22). The second record consists of excerpt from "Songs of Bilitis," by Pierre Louys, against a musical background. It is described on the jacket as "[a] frankly intimate description of a sensuous young girl's lesbian desires" (GX 23A).

The existence of all the elements of the offense,

[2] Each count named two records, but only one record was submitted to the jury on each count (R. 28a).

other than the obscenity of the materials at issue, was stipulated, and both sides agreed to submit the materials to the jury without any testimony in regard to the issue of obscenity (Pet. App. A–2). After the jury returned a verdict of guilty on all counts, the trial judge made an examination of the materials and concluded independently that they were obscene (R. 40a).

In the court of appeals, petitioner argued that the materials did not meet the test for obscenity established by this Court and that, in any event, the holding in *Roth* v. *United States*, 354 U.S. 476, that obscenity is not constitutionally protected speech, should be overruled.[3] The court of appeals held that the materials do meet the relevant test. It added that while petitioner could have required and presented evidence concerning community standards of obscenity, he had declined that opportunity by his agreement to submit only the materials to the jury without testimony (Pet. App. A–2). Judge Waterman dissented on the ground that, despite petitioner's agreement to submit the issue of obscenity to the jury without testimony of any kind, the court's decision in *United States* v. *Klaw*, 350 F. 2d 155 (C.A. 2), required the government to introduce additional "evidence that the challenged material in fact appealed to the prurient interest of either the average man or typical deviate" (Pet. App. A–8).

ARGUMENT

1. Petitioner agreed at trial to submit the issue of obscenity to the jury on the basis of the materials

[3] Petitioner's brief and reply brief in the court of appeals have been lodged with the Clerk.

themselves, without any testimony, nor did he urge any failure of proof in this regard in the court of appeals. He cannot, therefore, urge as error in this Court the failure of the government to introduce such additional evidence of obscenity.[4]

Moreover, there is no requirement that the government must, absent such an agreement, adduce testimony regarding obscenity in every case. *Kahm* v. *United States,* 300 F. 2d 78, 84 (C.A. 5), certiorari denied, 369 U.S. 859. The most that can be said is that such testimony may be used to "enlighten" the trier of facts. See *Smith* v. *California,* 361 U.S. 147, 164–165 (Frankfurter, J., concurring), 172 (Harlan, J., concurring). The decision of the Second Circuit in *United States* v. *Klaw,* 350 F. 2d 155, 166, is not to the contrary. In *Klaw,* the materials at issue were directed at a deviant group with atypical sexual interests. The court of appeals held that such materials could not be characterized by a jury as appealing to prurient interest without extrinsic testimony regarding their special nature. In this case, however—as, indeed, in most obscenity cases—the sexual orientation of the materials is apparent on their face to the average person without supporting testimony.

Nor was there a failure in this case to establish scienter. That element is established by proof that the purveyor was familiar with the contents of the

[4] Contrary to the suggestion of Judge Waterman in dissent, petitioner's motion to dismiss in the trial court did not constitute a retraction of his agreement to proceed without extrinsic testimony but only raised the question whether, on an intrinsic evaluation, the materials could properly be characterized as obscene.

materials which he sold. *Rosen* v. *United States,* 161 U.S. 29, 42; *Roth* v. *United States,* 354 U.S. 476, 491 n. 28. Here petitioner, by stipulating all elements other than obscenity, stipulated such knowledge. He can, in all events, hardly claim lack of knowledge of the contents of the labels which he affixed and on which his name and address appeared as manufacturer; and, from the statements appearing on the jackets of the two records which were the subject of the remaining counts, the jury could infer that he possessed familiarity with the nature of their contents as well. Compare *United States* v. *Hochman,* 277 F. 2d 631, 633 (C.A. 7), certiorari denied, 364 U.S. 837.

2. Both the $1,000 fine imposed on count one and the concurrent suspended six-month prison sentences imposed on all the remaining counts can be supported by reference to the obscene label whose mailing was charged in counts one through five. Conviction in regard to this label was under 18 U.S.C. 1463 (*supra,* p. 3) which is directed at "indecent, lewd, lascivious, or obscene" envelopes, wrappers or postal cards, *i.e.,* at matter open to public view. The label in this case (see Statement, *supra,* p. 4) seems sufficiently vulgar and without redeeming features to come within the purpose of this section to restrain the mailing of outwardly offensive material, and the jury and both counts below so held.

The suspended concurrent six-month prison sentences may also be sustained by reference to either of the two records, the mailings of which were found to violate 18 U.S.C. 1461. "Erotica—the rhythms of love"

(see Statement, *supra*, p. 4) contains no intelligible speech and is, by its own admission, not an attempt at artistic interpretation; nor does it purport to be a scientific study. It would seem, therefore, to lack redeeming virtues under the test of *Roth* v. *United States*, 354 U.S. 476, and we submit that the findings of the jury and both courts below regarding its appeal to prurient interest and patent offensiveness are reasonable in view of the character of the record.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1966.

[5] The case was tried, submitted to the jury and argued on appeal on the basis of the allegedly obscene materials themselves, without reference to whether their manner of distribution constituted an improper pandering to sexual interests. See the opinion in *Ginzburg* v. *United States*, No. 42, this Term, decided March 21, 1966. As shown in the text, however, the sentences imposed are supportable in this case by reference to the materials alone.

U.S. GOVERNMENT PRINTING OFFICE: 1966